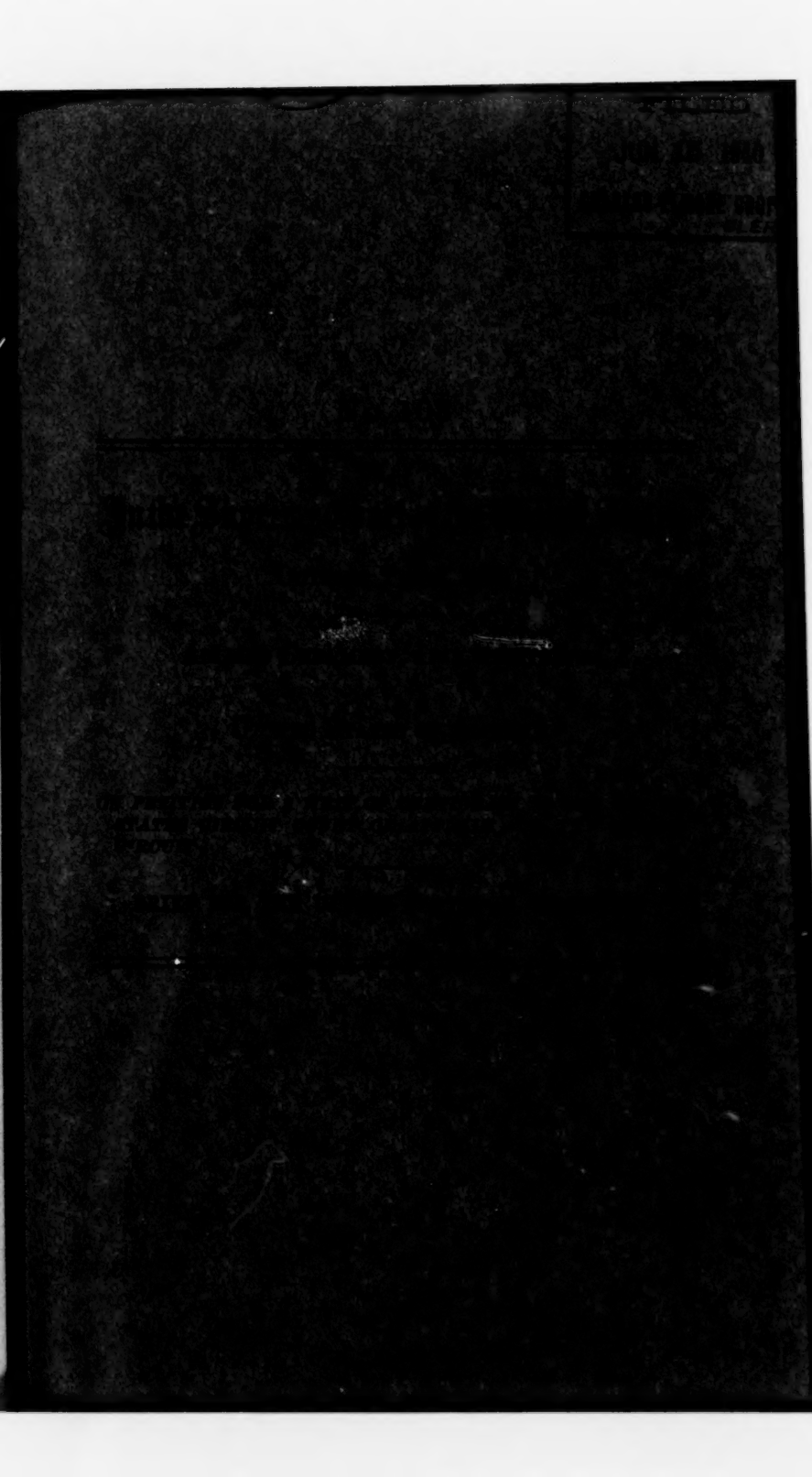

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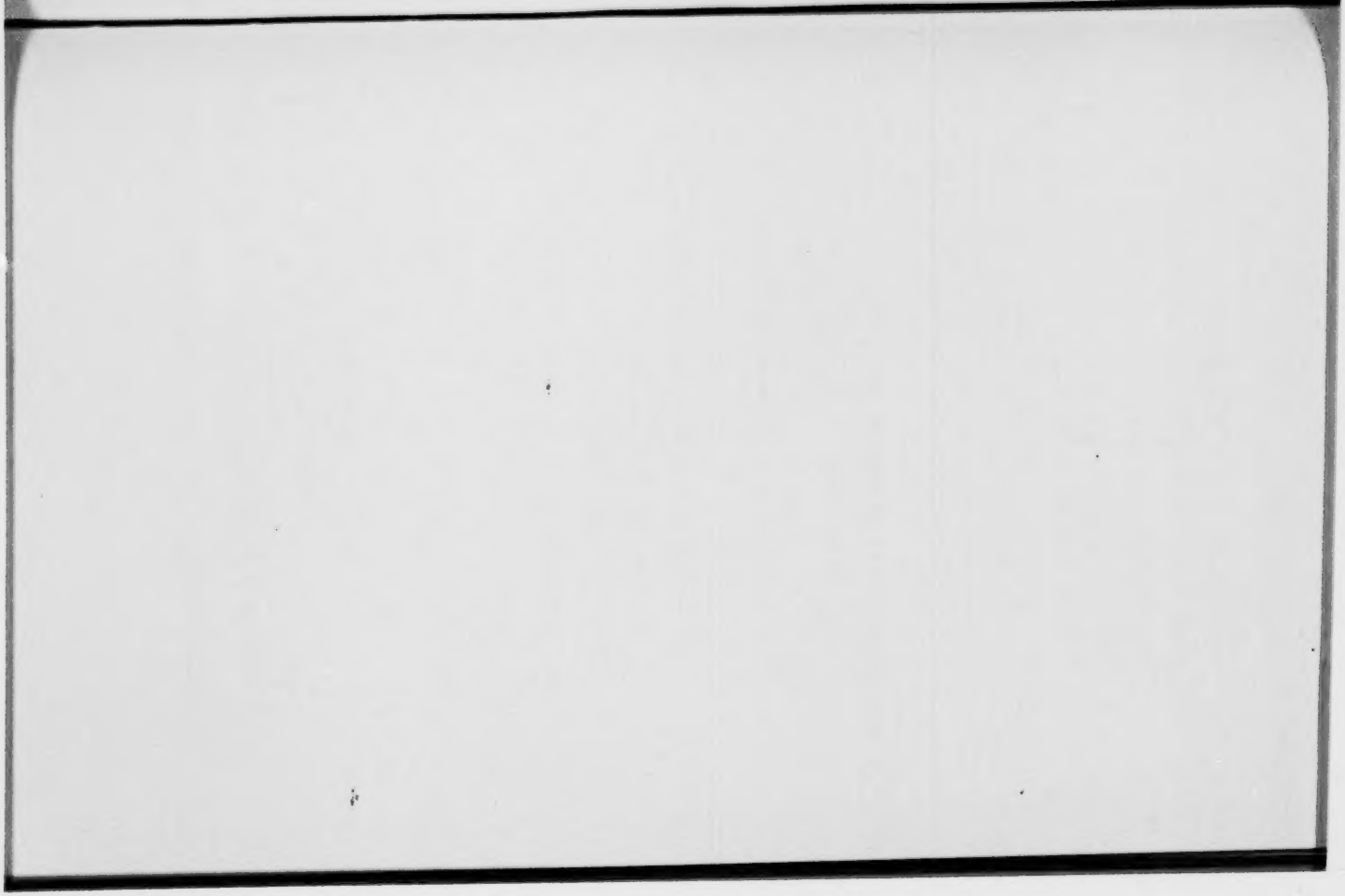

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 103

ADLER'S CREAMERY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 96–97) is reported in 110 F. (2d) 482. That opinion incorporates by reference a prior opinion reported in 107 F. (2d) 987, which was rendered on appeal from a judgment granting a preliminary mandatory injunction.

JURISDICTION

The judgment of the United States Circuit Court of Appeals for the Second Circuit was entered on April 3, 1940 (R. 98). The petition for a writ of certiorari was filed on May 25, 1940. The

jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the act of Febuary 13, 1925 (28 U. S. C., sec. 347).

STATUTE INVOLVED

The statute involved is the act of May 12, 1933 (c. 25, 48 Stat. 31), as amended May 9, 1934 (c. 263, 48 Stat. 672), as further amended August 24, 1935 (c. 641, 49 Stat. 750), and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937 (c. 296, 50 Stat. 246; 7 U. S. C. Supp. V, sec. 601 *et seq.*) (hereinafter referred to as the "Act"). A compilation of the Act is attached to this brief as an appendix.

QUESTIONS PRESENTED

1. Whether the Act authorizes the regulation of milk handled without crossing State lines but which is sold in competition with milk which moves in interstate commerce.

2. If such regulation is authorized by the Act, is it within the constitutional power of Congress?

3. If the regulation is otherwise valid, is petitioner deprived of property without due process of law by being compelled to obey the regulation during a period when competitive conditions make it economically unprofitable to do so?

STATEMENT

On July 25, 1939, the respondent, pursuant to the provisions of section 8a (6) of the Act, filed a complaint in the United States District Court for the

Northern District of New York seeking both a preliminary and a permanent injunction to restrain the petitioner from violating, and to compel the petitioner to comply with, the provisions of Order No. 27 (hereinafter referred to as the "order"), issued pursuant to the Act by the Secretary of Agriculture of the United States on August 5, 1938, effective September 1, 1938 (R. 5). The order regulates such handling of milk produced for sale in the New York metropolitan marketing area as is in the current of interstate commerce, or which directly burdens, obstructs, or affects interstate commerce.[1] The order was suspended effective January 31, 1939, but was reinstated effective July 1, 1939, and, with amendments not material to this case, has since been continuously in full force and effect. (R. 5.)

The petitioner answered the complaint admitting the issuance of the order by the Secretary in full compliance with the Act, admitting that it was engaged in the handling of milk, or cream therefrom, which was received at plants approved by the duly authorized local health authorities for the receiving of milk to be sold in the marketing area, admitting that it had filed with the Market Administrator created by the order the reports required,

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[1] See Article I, Section 1 (6) of the order which appears in the record as Exhibit A to the complaint (opposite R. 10). The terms of the order are fully described in the opinion of this Court in *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533.

and admitting that it had not made the required payments to the Market Administrator for November and December 1938 and January 1939 as required by the order. The petitioner's answer contained four affirmative defenses, two of which are now pertinent: (1) that the Act and the order were not applicable to the petitioner, or to the milk handled by it because all of the milk handled by the petitioner was produced in the State of New York, processed at plants in the State of New York, and transported to the marketing area by routes wholly within the State of New York; (2) that petitioner would be deprived of property without due process of law if required to pay for its milk the price to producers fixed by the order during a period when competitive conditions in the unregulated retail market were such that petitioner was unable to resell the milk at a profit.[2] (R. 19–27.)

[2] In substance petitioner alleged that at the time the order became effective the sale of fluid milk and cream in the marketing area was intensely competitive; that certain of petitioner's competitors supplying substantial quantities of fluid milk and cream to the marketing area contested the validity of the act and the order and, by refusing to pay the prescribed minimum prices, were able to sell, and did sell, fluid milk and cream in the marketing area at prices which petitioner, although efficiently managed and operated, could not meet if petitioner complied with the order by paying to producers the prescribed minimum prices; that the Government sought to compel compliance with the order on the part of these competing handlers (the appellees in *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533) but the District Court declined to compel such compliance; that

The case was first presented to the District Court on respondent's motion for a mandatory injunction *pendente lite*. That motion was granted and petitioner appealed. Upon that appeal the Court of Appeals reviewed the substantive questions now sought to be raised, deciding those questions adversely to petitioner, but held that a preliminary injunction was not an appropriate remedy. The court suggested that in the circumstances a motion for summary judgment might properly be entertained. *United States* v. *Adler's Creamery, Inc.*, 107 F. (2d) 987.

On September 21, 1939, respondent moved for summary judgment under Rule 56 of the Rules of Civil Procedure for District Courts of the United States, upon the complaint, answer, and affidavits filed by the respective parties (R. 30–32).

On November 28, 1939, the District Court filed its findings of fact and conclusions of law (R. 72–76) and entered final judgment (R. 77–78) (a) enjoining petitioner from violating the order and (b) mandatorily enjoining and commanding petitioner to comply with the order, and, particularly, to pay to the Market Administrator $46,796.66 found to be due and owing for the period from the effective date of the order to January 31, 1939.

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petitioner had complied with the order for the months of September and October 1938; that its noncompliance for the months of November and December 1938 and January 1939 was forced upon it by the refusal of the District Court to compel compliance by other handlers (R. 23–26).

Petitioner appealed from the judgment to the United States Circuit Court of Appeals for the Second Circuit and on March 18, 1940, that court, in a *per curiam* decision, affirmed the judgment of the District Court (R. 96–97).[3]

ARGUMENT

Petitioner presents no question which merits consideration by this Court. The decision of the court below is directly controlled by the decisions of this Court in *United States* v. *Rock Royal Co-op,* 307 U. S. 533; *H. P. Hood & Sons* v. *United States,* 307 U. S. 588; and *Hegeman Farms Corp.* v. *Baldwin,* 293 U. S. 163. There is no conflict between the various circuit courts of appeals on the questions which petitioner seeks to present.

[3] While the case was pending in the District Court, Holton V. Noyes, Commissioner of Agriculture and Markets of the State of New York, with leave of court (R. 88) intervened and sought an injunction requiring the petitioner to comply with Official Order No. 126 (which appears in the record opposite page 60), issued September 1, 1938, pursuant to article 21, section 258–m of the Agriculture and Markets Law of the State of New York (c. 383, Laws of 1937), if the court should find that the petitioner was not subject to the federal order (R. 78–87). On December 4, 1939, the District Court denied petitioner's motion to dismiss the intervening complaint (R. 91), and petitioner's appeal from the order denying the motion was dismissed by the United States Circuit Court of Appeals for the Second Circuit (R. 98). Petitioner does not seek a review of the action of the District Court in this respect.

Cf. *H. P. Hood & Sons* v. *United States,* 97 F. (2d) 677 (C. C. A. 1st); *Wallace* v. *Hudson-Duncan & Co.,* 98 F. (2d) 985 (C. A. A. 9th). The only authority which petitioner suggests as supporting its position is the obviously inapplicable decision of this Court in *Schechter Corp.* v. *United States,* 295 U. S. 495.

1. Section 8c (1) of the Act authorizes the Secretary of Agriculture to issue orders regulating the handling of milk which "is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects interstate or foreign commerce" in milk. Petitioner's milk is marketed in the New York City area, and is in active competition with that milk, amounting to about 50 percent of the total, which moves to New York City across state lines (R. 74). Petitioner necessarily concedes that the marketing of its milk is inextricably connected with the marketing of that milk which physically moves in the current of interstate commerce. This is the consequence of its subsequent attempt to invoke the due-process clause because it was economically impossible for petitioner to abide by the order and compete with those interstate handlers who, encouraged by the refusal of a district court to compel obedience to the order, refused to obey it. Conversely, the granting of a competitive advantage by relieving petitioner from

the necessity of observing the order would directly burden, obstruct, and affect interstate commerce in milk. It follows that even though the milk which petitioner handles does not move in interstate commerce, it is embraced by the terms of the statute and is subject to regulation.

In its supporting argument petitioner suggests that the order was not intended to regulate handlers who handled no milk which actually crossed state lines. Petitioner's speculations as to intent are entitled to little weight in view of the fact that the order by its terms is as broad in application as the authority prescribed in the Act.[4]

2. Petitioner's attack upon the constitutional authority of Congress to regulate commerce which does not move across state lines in order to make effective the regulation of interstate commerce is answered by numerous decisions of this Court. *Houston & Texas Ry.* v. *United States,* 234 U. S. 342; *Stafford* v. *Wallace,* 258 U. S. 495; *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1; *Labor Board Cases,* 301 U. S. 1; *Consolidated Edison Co.* v. *N. L. R. B.,* 305 U. S. 197; *Currin* v. *Wallace,* 306 U. S. 1; *Mulford* v. *Smith,* 307 U. S. 38; *United States* v. *Rock Royal Co-op,* 307 U. S. 533.

The question as it relates to the milk industry was definitely settled by the decision in the *Rock*

[4] Compare Section 8c (1) of the Act with Art. I, Sec. 1 (6) of the order which is inserted immediately following page 10 of the record.

Royal case. Petitioner attempts to distinguish that decision by pointing to the Court's statement that the milk of all handlers involved reached the market "through the channels of interstate commerce." This phrase could not have been intended to mean that all of the handlers were handling milk *transported* in interstate commerce, for one of the appellees contended, without challenge, that its milk moved only intrastate.[5]

3. Petitioner's claim that it should be relieved of compliance with the order as to the months of November and December 1938 and January 1939 because of the difficulty of compliance in the face of the competitive conditions then prevailing in the market is without merit. The same question was necessarily before this Court in the *Rock Royal case.* There, the appellees had failed and refused to pay similar obligations accruing during the same months. The opinion of this Court specifically

[5] Central New York Co-operative Association, Inc., alleged in its answer that (*Rock Royal* record, No. 771, 826, October Term, 1938, p. 80):

> All milk handled by this defendant is sold in the State of New York and none of the milk handled by this defendant crosses state lines at any time, nor is such milk handled by this defendant mixed with milk which has crossed state lines or has been produced in other states and none of the milk handled by this defendant is at any time in the current of interstate commerce nor does any of the milk handled by this defendant at any time affect, interfere with, burden, or obstruct interstate commerce.

directed the court below to enter an order which would require the appellees to make the payments demanded. Petitioner suggests no reason, except that it had for a time complied with the order, which would justify according it more favorable treatment. Petitioner's entire argument is based on the contention that competitive prices in the unregulated retail market were so low that it could not afford to pay the farm price to producers which was fixed by the order. The due-process clause does not protect business from the hazards of competition. *Hegeman Farms Corporation* v. *Baldwin,* 293 U. S. 163. The fact that the competition was made possible through violations of the Secretary's order gives petitioner no special immunity from its hazards.

Finally, if the prices fixed were too high or if legal reasons existed for exempting petitioner from complying with the order, administrative machinery was available by which petitioner could have obtained relief (Section 8c (15) of the Act). No claim is made that petitioner ever sought to avail itself of that administrative remedy. Consequently, petitioner has no standing now to present such questions to the courts. *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125; *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U. S. 41.

CONCLUSION

The questions presented were correctly decided by the court below and have been settled by the

decisions of this Court. We, therefore, respectfully submit that the petition for a writ of certiorari should be denied.

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